No. 17-71

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE LANDOWNERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici are landowners who value the presence of endangered species on their property and who welcome efforts to preserve the species' habitats. Amici file this brief to correct Weyerhaeuser's one-sided description of the effect of the Endangered Species Act on property owners.

SUMMARY OF ARGUMENT

Weyerhaeuser and its amici depict the Endangered Species Act as if it merely imposed burdens on landowners. In fact, the protection of endangered species also confers *benefits* on many landowners. The ability to live among rare forms of wildlife is of substantial value, in both an economic and a non-economic sense, to a great many people. Some landowners buy property specifically because it is the habitat of endangered species, and many more welcome efforts to protect endangered species found on their land. The presence of endangered species can be a valuable amenity associated with real property, like a view of the ocean or proximity to a park.

This brief will show the value of endangered species to landowners in two ways.

First, the brief will tell amici's own stories. Amici are landowners who are committed to protecting the endangered species on their property. Some have commercial reasons, while others simply enjoy the recreational opportunities afforded by living among

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici made a monetary contribution intended to fund the preparation or submission of this brief. The parties have all filed blanket consents to amicus briefs.

rare animals. For these landowners, the Endangered Species Act is a benefit, not a burden.

Second, the brief will show that amici are hardly unusual in valuing the protection of endangered species. Studies have repeatedly shown that proximity to environmental amenities raises the value of real property. In today's world, the presence of endangered species is an increasingly valuable amenity. Just as people will pay to live close to the water or to greenspace, they will pay to live close to wildlife.

In determining whether the Fish and Wildlife Service's interpretation of the statute is reasonable, therefore, a court cannot simply look to the losses suffered by the particular landowner who happens to be litigating. The court also has to consider the benefits FWS's interpretation confers upon countless other landowners who have no reason to litigate.

ARGUMENT

Many landowners welcome efforts to preserve the habitats of endangered species on their property, because they place great value on living among rare forms of wildlife.

A. Amici have cooperated with the Fish and Wildlife Service to protect endangered species on their land, for both recreational and commercial reasons.

Amici live in many different places and pursue many different callings, but they have one thing in common. They are all landowners for whom the protection of endangered species on their property is a gain, not a loss. Some have commercial reasons for

supporting the government's efforts to preserve the species' habitats. Others simply enjoy viewing rare forms of wildlife on their property.

Here are their stories.

Ann Prezyna owns 120 acres in Cochise County, in southeast Arizona. She purchased the property specifically because it is home to a wide variety of wildlife and native plants, including rare and endangered species such as the yellow-billed cuckoos she enjoys watching nest in her front yard. Prezyna placed a 100% conservation easement on most of the property, and has spent considerable money and effort improving its value as habitat. "Observing wildlife going about their lives from my front porch makes me very happy, and is a simple pleasure I share with countless friends," she notes.

Lance Kyle has a 99-year lease on property in Kendall County, Texas, outside of San Antonio. He runs an eco-tourism business. Having endangered species on the land is good for business, because it helps attract customers interested in learning about the natural world.

Nancy Warren owns 281 acres in Ontonagon County, in the Upper Peninsula of Michigan. Her property is the habitat of several rare animal species, including wolves and eagles. She explains: "Having endangered and threatened species using our property has enhanced our enjoyment of our property. We enjoy finding wolf tracks and hearing them howl while standing in our yard and capturing their picture on our trail camera. We often see eagles soaring overhead and find wood turtles along the river bank." Warren describes her property as "a ca-

cophony of chirps, cackles, wails and honks, from spring peepers, toads, trumpeter swans, bitterns, geese, ducks, warblers, redwing blackbirds, tree swallows, hawks, and kestrels. Our wetlands have become a place for us to find solitude and enjoy nature."

Susan Sorrells owns property in Inyo County, California. She is using her land to create a habitat for the reintroduction of the Amargosa vole, a nearly extinct species of rodent. Several years ago she successfully did the same for the Shoshone pupfish. "We're recreating a habitat that has nourished all of these creatures for hundreds of years," Sorrells observes. "It's creating a great ecotourism opportunity for us. We have a good shot at really doing groundbreaking work on habitat restoration."

David Bugni owns 84 acres in Clackamas County, Oregon, not far from Portland. His property includes species of endangered or threatened fish, including coho salmon and winter steelhead. "As a matter of principle," he notes, "we value, appreciate, and enjoy biological diversity within our property in particular and worldwide in general. We have tried to instill this philosophy in our two children as well." The land is used for logging, and state law forbids cutting timber too close to the streams inhabited by the fish, but Bugni does not consider this an onerous restriction. "In fact, in our management plan for our forestland, we require even more stringent streamside buffers than those mandated by the State of Oregon."

Peter Tallman and his wife own property near the San Francisco River in Catron County, New Mexico. Several endangered species live on their land, in-

cluding yellow-billed cuckoos, which arrive every summer. They enjoy watching the cuckoos from their front porch. The Tallmans rent out their guest house to vacationers, and they advertise the quality of bird life as a feature of the property.

Robert Ukeiley owns 290 acres in Baca County, in the southeastern corner of Colorado. The land is short grass prairie, part of a larger network of short grass prairie preserves. He explains: "My main, and really only motivation, for obtaining, keeping, and managing my land is to allow a native short grass prairie system to thrive, including the native plants and animals which belong in the short grass prairie." Ukeiley manages his land to provide a viable habitat for the black-footed ferret, an endangered species once thought to be extinct.

Elissa Wagner owns property in Santa Cruz County, California, that is part of the migratory path of the Santa Cruz long-toed salamander. The presence of the salamander "was a definite plus in our decision to buy this home and property." Her house is built on pilings to allow the salamander to traverse the property. "I love doing my best to be a steward of the earth," she says. The salamander is "a great emblem for thinking about our necessary connection to nature and the reciprocity of biodiversity—that in sustaining it, we sustain ourselves."

Carol and Paul Sills own property in Door County, Wisconsin, near Lake Michigan. They have asked to have their wetlands designated as critical habitat for the Hine's emerald dragonfly, because "we've admired the swarming activity of the dragonfly near our land."

Paul and Elizabeth Duncan own a 7-acre tract in Williamson County, Texas. When they bought the property in 1996, they knew that is the habitat of two endangered species of birds, the golden-cheeked warbler and the black-capped vireo. "We were aware of the ramifications and restrictions of the listing before we purchased the property," they recall, "and the listing did not deter our desire to own the property." Another species, the Georgetown salamander, was found in their property and listed by FWS as a threatened species in 2014. The Duncans have supported efforts to protect all three species, and they intend to continue doing so.

Gordon Pratt owns 75 acres in Riverside County, California, near the Beauty Mountain Wilderness Area. He purchased the land specifically to protect the Quino checkerspot, an endangered species of butterfly, and several other rare insect species. He grows many of the plants that the Quino checkerspot eats. "The advantage of owning the property is that I can do things to help butterflies by improving habitat," he says. "These projects on public lands require that I get permits and whatnot which make doing these projects often very difficult." Pratt enjoys learning about the relationship between animals and plants and their environment. "I hate to see any species get lost due to human effects upon the environment, since each species plays its own role in nature," he observes. "When I had enough money to purchase land for animal preservation I began doing such."

Ginger and Allan Heydman own property in Hays County, Texas, between Austin and San Antonio. Their land includes habitat for the golden-cheeked

warbler. When they bought the property, they recall, "the only consideration we had was to move to an untouched area we could preserve and interact with." They enjoy seeing the warblers on their land. The Heydmans have deliberately not cut down any of their larger trees, to preserve the birds' nesting sites. "We appreciate endangered species," they say, "because diversity is of paramount importance in preserving life as we know it on this planet."

Tom and Cathy Aley own property that is critical habitat, and indeed the only habitat, of the Tumbling Creek cavesnail, an endangered species that lives in a single cave in Taney County, Missouri. They have been trapping and removing an invasive crayfish that drove the cavesnail nearly to extinction. "Our snails are a community asset," Tom says. "Critical habitat has been a great help to us. We can prevent an extinction with what is in reality a very small amount of federal and state help."

Noah Greenwald and Amy Atwood bought their property in Deschutes County, Oregon, in part because it is critical habitat for the Oregon spotted frog. The habitat attracts other wildlife, including songbirds and deer. "Viewing and enjoying wildlife is a cherished activity for our whole family," they explain. They earn income from the wildlife as well. They have a cabin on the property which they rent to guests who share their enjoyment of the spotted frog and other species. The habitat "is certainly a draw," they say. "In the future, we plan to have some on-site education materials for guests who stay at the cabin."

Karen LeMay and Bob Behrstock moved from the San Francisco Bay Area to rural southeastern Arizo-

na to live closer to nature. Over three hundred species of birds and butterflies have been recorded on their property, several of which are endangered or threatened. Behrstock is a biologist who has led birding tours for forty years. He also sells photographs of birds and insects. LeMay is the founding director of Pollinator Corridors Southwest, a nonprofit organization that supports native plant habitats and the insect, bat, and hummingbird species that pollinate these plants. "We appreciate having endangered species and their habitat on our property because we feel strongly about living in harmony with the natural world," she says. "We take seriously the responsibility of encouraging the well-being of wildlife."

Bruce Means owns 50 acres in the Apalachicola National Forest, near Tallahassee, Florida. His property is critical habitat for the frosted flatwood salamander.

Lori Andresen owns land in Superior National Forest, in northeastern Minnesota. There are gray wolves on her property.

Charles Laird owns property in Washington that is habitat for several threatened and endangered species. He has been restoring the forest on his land to enhance the habitat.

Francis Schabram owns a 750-acre ranch in Calaveras County, California. Her property is critical habitat for the California red-legged frog. "I am proud of that fact," she says, "and dealing with Fish and Wildlife has had only positive impact on the ranch."

Brian Brown owns a farm in Inyo County, California, near Death Valley. His property includes crit-

ical habitat for the southwestern willow flycatcher and is also nesting habitat for the Least Bell's vireo. (These are two species of birds.) He has willingly allowed the Fish and Wildlife Service to restore the habitats on his property.

John Carter owns property in Idaho that he uses as a preserve for gray wolves and grizzly bears.

Crystal McMahon owns land in Klamath County, Oregon, that she is restoring to support the recovery of the Lost River sucker and the shortnose sucker, two species of fish.

Peggy and James Alexander own property in Greenlee County, Arizona, in the southeastern part of the state. Their land is habitat for several endangered species, including the loach minnow and the southwestern willow flycatcher. "It makes me feel lucky to be part of giving them a safe place to be, to rear their young and survive," Peggy says. She uses no pesticides or fertilizers, in order to protect the habitat.

Elaine Evans is a bee researcher at the University of Minnesota who owns property in St. Paul that is habitat for the endangered rusty-patched bumblebee. "I have always managed my property to maximize habitat for bees," she says. "I have regularly seen the rusty-patched bumblebee foraging in my yard. I appreciate that I see some in my yard every year as many of my fellow bee researchers have never seen this species alive."

Eric Horvath owns property in Oregon that includes a half-mile of stream with coho salmon spawning habitat. He has been helping to restore the

stream by planting trees for shade and placing large logs in the stream to enhance the habitat.

Sandy Anderson owns and operates the Gray Hawk Nature Center in Cochise County, Arizona. Her property is habitat for the yellow-billed cuckoo and the Huachuca water umbel. "As a land owner," she explains, "I am thrilled when my property can support an endangered species."

B. Proximity to wildlife and other environmental amenities can increase the value of real property.

The fact that many landowners value the presence of endangered species would come as no surprise to anyone familiar with the literature on this topic. A very large body of research demonstrates what experienced house-buyers know intuitively: Proximity to environmental amenities can increase the value of residential property.

For example, all else equal, the closer a residential parcel is to a greenbelt or to a park, the more valuable the parcel will be. Margot Lutzenhiser and Noelwah R. Netusil, *The Effect of Open Spaces on a Home's Sale Price*, 19 Contemporary Economic Policy 291, 297 (2001); Arthur C. Nelson, *Using Land Markets to Evaluate Urban Containment Programs*, 52 Journal of the American Planning Association 156, 163 (1986); Mark R. Correll et al., *The Effects of Greenbelts on Residential Property Values: Some Findings on the Political Economy of Open Space*, 54 Land Economics 207, 211 (1978); Thomas R. Hammer et al., *The Effect of a Large Urban Park on Real Estate Value*, 40 Journal of the American Institute of Planners 274, 277 (1974).

The same holds true for other environmental amenities. The better the view of the ocean, all else equal, the more valuable the property. Rob Fraser and Geoff Spencer, *The Value of an Ocean View: An Example of Hedonic Property Amenity Valuation*, 36 Australian Geographical Studies 94, 98 (1998). Land becomes more valuable, all else equal, the closer it is to a sports field, a golf course, or a beach. Parvin Mahmoudi et al., *Space Matters: The Importance of Amenity in Planning Metropolitan Growth*, 57 Australian Journal of Agricultural and Resource Economics 38, 53-54 (2012).

Proximity to wildlife likewise enhances the value of residential property. In the northeast, an average home located near a National Wildlife Refuge is approximately six percent more valuable than a comparable home elsewhere. Xiangping Liu et al., *Amenity Values of Proximity to National Wildlife Refuges: An Analysis of Urban Residential Property Values*, 94 Ecological Economics 37, 42 (2013). In Florida, the premium is above ten percent. *Id.* The most thorough study of this topic concludes that "[t]he total capitalized value for homeowners within 0.5 mi[les] of a refuge and within 8 mi[les] of an urban core is over $270 million, averaging $11 million per refuge." *Id.* *See also* Bradley C. Neumann et al., *Property Price Effects of a National Wildlife Refuge: Great Meadows National Wildlife Refuge in Massachusetts*, 26 Land Use Policy 1011, 1018 (2009) (finding that homes become more valuable the closer they are to a National Wildlife Refuge).

Many homeowners value proximity to wildlife and they are willing to pay for it. Amici are typical in this respect.

Amici are also typical in the value they place specifically on preserving endangered species. The economic value of saving endangered species obviously cannot be measured directly, because there is no market in endangered species. But it can be measured indirectly, by conducting surveys that ask large numbers of people how much they would be willing to pay to protect particular endangered species from extinction.

The results of these surveys indicate that people are willing to pay significant sums in aggregate to preserve endangered species. Leslie Richardson and John Loomis, *The Total Economic Value of Threatened, Endangered and Rare Species: An Updated Meta-Analysis*, 68 Ecological Economics 1535 (2009); John B. Loomis and Douglas S. White, *Economic Benefits of Rare and Endangered Species: Summary and Meta-Analysis*, 18 Ecological Economics 197 (1996). When the gains from protecting species are measured this way, they can easily exceed the lost commercial value of the affected land. *See, e.g.*, Timm Kroeger and Frank Casey, *Economic Impacts of Designating Critical Habitat Under the U.S. Endangered Species Act: Case Study of the Canada Lynx (Lynx Canadensis)*, 11 Human Dimensions of Wildlife 437 (2006).

Indeed, many landowners volunteer to protect endangered species on their property by participating in a variety of programs that encourage them to do so. Christian Langpap and Joe Kerkvliet, *Endangered Species Conservation on Private Land: Assessing the Effectiveness of Habitat Conservation Plans*, 64 Journal of Environmental Economics and Management 1 (2012); David S. Wilcove and Joon

Lee, *Using Economic and Regulatory Incentives to Restore Endangered Species: Lessons Learned from Three New Programs*, 18 Conservation Biology 639 (2004).

Some real estate developers recognize that the presence of endangered species can enhance the value of residential property. In fact, in this very case, one of the public comments in favor of designating the land at issue as critical habitat was filed by Tradition Properties, Inc., which is building a master-planned community in the area. Tradition is marketing the homes to residential buyers who enjoy experiencing the natural world. Approximately 10 acres of the Tradition property are within the critical habitat designated for the gopher frog. Tradition explained:

> One of the four founding principles of Tradition is our commitment to environmental stewardship. This stewardship principle was reflected in our early planning efforts and continues to be a guiding principle as we work to establish a viable, vibrant community. In 2000, the Sierra Club recognized this commitment by naming Tradition a "Smart Growth Success Story," awarded to only one project in each state. The honor cited Tradition as a new model for coastal development and one that frees residents from captivity to their automobiles.
>
> ... Tradition supported the designation of the gopher frog as an endangered species and provided financial assistance to the USFWS and the U.S. Forest Service ("USFS") to conduct a tracking study to understand the migration and habits of the Mississippi gopher frog. Addition-

> ally, Tradition voluntarily imposed a "temporary no-development zone" on a portion of its community abutting the USFS land during the USFWS studies. ...
>
> Between 25-35% of Tradition's property is dedicated to green-space, public parks, and public common space, and we are creating a series of interconnected hiking and biking trails and pedestrian pathways throughout the community to reduce the dependency on automobiles. Additionally, we have plans to craft an organic, working farm on approximately 25 acres that will serve as a regional asset for locally sourced, sustainable, healthy foods.
>
> In summary, Tradition is committed to continuing its demonstrated record of being a good neighbor and steward of the environment. We support the USFWS designation of critical habitat for the Mississippi gopher frog as proposed.

July 30, 2010, Public Comment of Tradition Properties, Inc. (AR 1650). This is the comment of a profit-maximizing corporation that recognizes that the presence of endangered species will enhance the value of its real property.

In short, assessing the effect on land values of protecting endangered species is not as simple as Weyerhaeuser appears to believe. Different landowners place the Endangered Species Act on different sides of the ledger. It is a loss for some, but it is a gain for others. Some landowners oppose the designation of critical habitat on their property, while others support it.

This diversity of views among landowners suggests that a court should be cautious in evaluating whether the Fish and Wildlife Service has interpreted the statute reasonably. Lawsuits over the Endangered Species Act are, by definition, filed only by aggrieved landowners. In the normal course, a court never hears from all the landowners who favor the designation of their land as critical habitat, because these landowners have no reason to sue the government.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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